ESSAYS,

On the legal Import of the Terms

HEIRS, HEIRS OF THE BODY, ISSUE, &c.

In several Instruments of Conveyance, &c.

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OF THE

OPERATION

OF THE

TERMS HEIRS, AND HEIRS OF THE BODY,

In a Will or other Inſtrument of Conveyance.

THE general rule is, that thoſe terms do not denote any particular perſon to take by way of deſcription, as Deviſee, Grantee or Donee; neither does any eſtate, by the uſe of thoſe terms, veſt in any perſon in character of Heir, but only in the perſon of him who is named in the Inſtrument of Conveyance, who takes by purchaſe: But the Heirs there named do not take as purchaſers; they are words merely deſcriptive of the quantity of the eſtate given: As if an eſtate is deviſed to A. and his Heirs forever; in this caſe, A. alone takes the eſtate as a purchaſer, and the terms, *his Heirs forever*, denote what eſtate is limited by the deviſe to A. viz.—a Fee-ſimple wholly in his power to alien or diſpoſe of as he pleaſes; and is upon his death deſcendable to his Heirs in general. If it is deviſed to A. and *the Heirs of his Body*; this denotes the eſtate to be an *Eſtate Tail*, deſcendable to no other Heirs but to thoſe of his Body. They ſerve then not as a deſignation of any perſon who is to take the eſtate, but only as deſcriptive of the quantity of the eſtate taken by the Deviſee.—See the caſe of *Brett* and *Rigden*, *Plowden* 343; where there was a Deviſe to a man *and his Heirs*. The Deviſee died in the life time of the Deviſor, and the Heir of the Deviſee could not take, for the word *Heirs* was not named as a word of Purchaſe, but only to expreſs what *Eſtate* the Deviſee ſhould take. The Heirs therefore are named only to convey the land *in fee*, and not to make any *purchaſer* other than the firſt Deviſee.—So eſſentially neceſſary is the word *Heirs*, that no eſtate of inheritance either in fee-ſimple or fee-tail can by deed be conveyed without it; but it has, we ſhall ſee in the purſuit of this ſubject, been very frequently diſpenſed with in Deviſes.

We find a rule laid down in *Shelley's Caſe*, 1ſt Report 93, —That in any Inſtrument, if a free-hold is limited to the anceſtor *for life*, and the inheritance to *his Heirs*, either mediately or immediately, the firſt taker takes the whole eſtate. If it is limited to the *Heirs of his Body*, he takes a fee tail; if to *his Heirs*, he takes a *fee ſimple*.—Wherever, therefore, we find an eſtate given to one *for Life*, and to *his Heirs*, or to the *Heirs of his Body*, and there is nothing more in the caſe, the firſt taker invariably takes a *fee ſimple* in the former caſe, and a *fee tail* in the latter; and this as well in a Deviſe as in any other Inſtrument of Conveyance. This is allowed on all hands to be an incontrovertible poſition. See *Perin* and *Blake* reported in 4th *Burrow*, 2579.

Thus far the rule in *Shelley's* Caſe has prevailed without contradiction; notwithſtanding that it was founded upon reaſons of feudal policy, which have long ſince ceaſed.—However in Deviſes the rule in *Shelley's* Caſe has been frequently broken in upon; for it is an axiom of the Engliſh law that Wills are to be conſtrued according to the intention of the Teſtator, if that intention be manifeſtly clear and conſiſtant with the Rules of Law.——In the application of the Rule there has been a very great difference of opinion among the moſt diſtinguiſh'd Lawyers of the Engliſh nation; the conſequence of which is, that the Caſes on this ſubject are not reconcilable; for whilſt it is contended by ſome, that if upon the whole Will taken together there appear a manifeſt intention to give an Eſtate for Life only, the firſt taker ſhall take no greater Eſtate than an Eſtate for Life. On the other hand it is contended that ſo long as the Teſtator has uſed technical expreſſions, to which the Law has affixed a determinate meaning, the Law will not ſuffer their ſenſe to be perverted; and in ſuch caſe the intention of the Teſtator, be that intention what it may, is controuled by the ſuperior force of thoſe technical expreſſions; for, ſay they, the Intention of the Teſtator, altho' manifeſtly clear, is not conſiſtent with the Rules of Law. If the former ſenſe of the axiom be juſt, I cannot conceive that any caſe can ariſe upon a Will, where there is a Deviſe to one for Life, in which he can take any greater Eſtate. The intention of the Teſtator in ſuch caſe is as clear as it can be made by the moſt perſpicuous language; for he has limited a *life Eſtate* to the Deviſee expreſsly. But this, of itſelf, is not contended

by any Engliſh lawyer to be ſufficient evidence of intention to give no greater Eſtate than an Eſtate for Life, when an Eſtate is thus given to one and his Heirs. But it is agreed on all hands, that where an Eſtate is given to one *for Life*, and to *his Heirs*, that the firſt taker has an Eſtate *in fee*; and the terms, *for his Life*, ſignify nothing. Still it is contended by ſome, that if there are other expreſſions in the Will indicative of an intention to convey only an Eſtate *for Life*; in ſuch caſe no greater Eſtate is given. They ground themſelves, I apprehend, upon this;—that altho' the natural import of the words, *to one for Life and to his Heirs*, would have been to give to the Deviſee an Eſtate for Life only; yet ſince the doctrine before mentioned had been eſtabliſhed in *Shelley's* caſe, and the legal ſenſe of theſe terms being univerſally underſtood, to give them any other than the legal technical conſtruction would moſt probably thwart the intention of the Teſtator; for the preſumption in ſuch caſe is, that the Deviſor uſed them in their well known and eſtabliſhed ſenſe—to conſtrue ſuch Deviſe to be a *fee*, then, would probably fulfil the Intention of the Teſtator, the great thing to be obſerved in the conſtruction of Wills. But they maintain that, whenever it appears in the Will, by any other language there uſed, that the Teſtator did not attach to thoſe technical expreſſions their legal technical ſenſe, the preſumption of their being ſo uſed is rebutted and removed out of the way, their natural import is reſtored, and they ſhall be conſtrued to convey nothing more than an *eſtate for life*.

With them it was a maxim, "once fix the *Intention*, "and the Law decides upon it without ambiguity; and that "as to the modes of expreſſion, the Law had eſtabliſhed "none for Wills. The Teſtator might uſe ſuch as pleaſed "him—the Law would ſupply, or would conſtrue entirely "to fulfil his Intention." As to the reſtrictive clauſe in the maxim which requires that the Teſtator's intention ſhould be conſiſtant with the Rules of Law they urge, that this is not applicable to the conſtruction of any *words* uſed by the Teſtator; and that the opinion that technical expreſſions muſt be conſtrued according to the meaning affixed to them by Law, altho' it manifeſtly appears that they were not uſed according to that meaning, is a miſtaken opinion, altho' they admit that when he uſed thoſe expreſſions, and there is nothing explanatory of a contrary intention, they ſhould be under-

ſtood in their legal ſenſe. They urge, that this reſtrictive clauſe is only applicable to the *Nature of the Eſtate*: If the Teſtator ſhould undertake to convey an Eſtate ſuch as the Law forbids, his Intention cannot be complied with; as where the Teſtator undertakes to create a perpetuity, or to make a *Chattel* deſcend to Heirs; for this would be impowering perſons to vary the Rule of Property which the Law has eſtabliſhed. This therefore ariſes from the want of *Power* in the Teſtator; it is what he cannot do by any words whatever, but there is no want of *Power* in a Teſtator to deviſe an Eſtate *for Life* to one with a limitation of *a fee* to another. And upon this ground they contend, that ſundry caſes may be found in which the term *Heirs*, not only in a *Will*, but in a *Deed*, where not ſo great indulgence is allowed to the intention of the Teſtator, has been taken as a word of Purchaſe; and as a leading authority, they cite *Archer's Caſe* 1ſt *Report* 66; which was a limitation in a Deviſe to A. *for Life* and to the *next Heir Male* of the body of A. and the *Heirs Male* of ſuch *next Heir Male*, and it was determined that A. took an Eſtate *for Life* only, and the Heir Male a remainder in *Tail*, veſting in him by purchaſe, and this from the manifeſt intent of the teſtator that it ſhould be ſo. To the ſame purpoſe is the caſe of *Clerk* and *Day*, *Croke Eliz.* 313. For altho' the terms, *Heirs Male*, were ſufficient to give an Eſtate Tail, as appears from a great variety of authorities, and ſuch limitation to A. for life and to his *heir* would have given an Eſtate Tail in A. yet, notwithſtanding, by uſing the term *next* Heir Male, and the ſuperadded words of Limitation, *his Heirs Male*, it was manifeſt that he uſed the term, *next Heir Male*, as *deſcriptio perſonæ* who ſhould take an Eſtate Tail: and if ſo, A. could have no greater eſtate than an Eſtate for Life. To the ſame purpoſe is the caſe of *Luddington* and *Kime*, *Ld. Raymond* 203, where A. deviſed Lands to B. *for Life without impeachment of waſte*, and in caſe he ſhould have any *Iſſue Male*, then to ſuch *Iſſue Male and his Heirs forever*. This was conſidered as ſtrong a Caſe as if the terms, *Heirs Male of his Body*, had been uſed; becauſe the term *iſſue* in a Will is to be conſidered as much a word of Limitation as *Heirs*. For this ſee the Authorities after cited. In this Caſe it was conſtrued to be an Eſtate for Life only in B. and a contingent fee in his Iſſue Male. It is plain that this Caſe was determined upon the clear intention of the Teſtator, that B. ſhould take for Life only;

and not becauſe there was any difference in the operation of the term *Heirs* and *Iſſue*; for, ſay the Court, if B. is ſuppoſed to take an Eſtate in Tail, then muſt be rejected the words *without Impeachment of Waſte*, and the intention of the Teſtator defeated in the ſuperadded words, *his Heirs forever*. From which it was certain, that the Intention of the Teſtator was that the Heirs general, male and female, of the Iſſue ſhould inherit, which could not be the caſe if B. took an Eſtate of Inheritance; for the Eſtate, if any, muſt be an Eſtate *Tail Male* by reaſon of the words *Iſſue Male*. In no way could the intention of the Teſtator be fulfilled, but by giving to B. an Eſtate for Life only, which was done. So is the Caſe of *Backhouſe* and *Wells*, 1ſt of *Eq. Ca. Abr.* 184, where there was a like determination. The Deviſe was to A. for *Life only*; and after his deceaſe to the *Iſſue Male of his Body*, and to the *Heirs Male* of the Bodies of ſuch *Iſſue*.

In the Caſe of *King* and *Melling*, 1ſt of *Ventris* 231, a Caſe is cited where a man deviſed to one *for Life* and *non aliter*, and after his deceaſe, to *the ſons of his Body*, which was equivalent to *Heirs Male of his Body*. This was held to be an *Eſtate for Life*, by reaſon of the words *non aliter*; for the ſame purpoſe *Lowe* vs. *Davis*, *Ld. Raymond* 1561, is relied on,—which was a Deviſe to *Benjamin Devon and the Heirs of his Body*, the *firſt*, *ſecond* and *third* and every other ſon and ſons ſucceſſively of the Body of the ſaid *Benjamin*, and the *Heirs of the Body of ſuch firſt*, *ſecond* and *third*, and every other ſon and ſons lawfully iſſuing, as they ſhall be in ſeignority of age and priority of birth; the eldeſt always and the Heirs of his Body to be prefered before the youngeſt and the Heirs of his Body, and in default of ſuch Iſſue then to his right Heirs forever.—It was determined that *Benjamin Devon* took an Eſtate for *Life only* upon the manifeſt *intent* that he ſhould have no greater Eſtate; for it was certain that the Teſtator, notwithſtanding his uſing the term *Heirs of his Body* in the Deviſe to *Benjamin Devon*, meant to give to the Deviſee's eldeſt ſon an *Eſtate Tail*, remainder in Tail to his ſecond ſon, and ſo on; which intention could not be fulfilled, if *Benjamin Devon* took an *Eſtate Tail*; therefore to fulfil the Intention of the Teſtator *Benjamin Devon* could not take a greater Eſtate than for Life.

To evince that the term *Heirs* may be conſidered as a word of purchaſe, and is not neceſſarily a word of Limitation denoting a ſucceſſion of certain perſons—See the caſe of *Liſle* and *Gray*, *Tom Raymond* 315; where *John Liſle* covenanted to ſtand ſeiſed of Lands to the uſe of himſelf for life, remainder to his ſon *Edward* for life, remainder to the firſt ſon of *Edward* in tail, with like remainders to his *ſecond*, *third* and *fourth* ſons, and ſons ſeperately and reſpectively to each of the Heirs Male of the Body of *Edward*, and *the Heirs Male of their Bodies*, remainder to *William Liſle*.—It was urged that here was a conveyance to *Edward for Life*, and in the ſame Inſtrument to *the Heirs of his Body*, and that therefore he took an *Eſtate Tail* agreeable to the rule in *Shelley's* Caſe; but it was determined that *Edward* took only an Eſtate *for Life*; for it was ſuppoſed to be clear that when the Grantor had limited an Eſtate Tail to four of *Edward's* ſons ſucceſſively, that the ſubſequent words, *to each of the Heirs Male of the Body of Edward*, intended each of the other ſons, and more eſpecially becauſe there were ſuperadded words of Limitation: It was urged, that whenever the Intention of the Teſtator appeared, if it was a clear intention to give an Eſtate *for Life*, no greater ſhould be taken: That there could be no peculiar magic in any particular words; for if ſome words in a Deed or Will evincive of the Teſtator's Intention can turn the words, *Heirs of his Body*, into words of *Purchaſe*, then other words may do the ſame; provided they do equally demonſtrate that Intention.—That this was the real ground of the determination in *Bagſhaw* and *Spencer*, reported in 1ſt *Vezey* 142, will be manifeſt to any one reads *Ld. Hardwick's* reaſons for his judgment in that caſe, which was a Deviſe to Truſtees to the uſe of *Thomas Bagſhaw*, for the term of the *natural life of the ſaid Thomas without impeachment of waſte*; and after the *determination of that eſtate* to ſaid Truſtees during *the life of ſaid Thomas*, and after his deceaſe to the uſe of the Heirs of the body of the ſaid *Thomas*.——*Ld. Hardwick* ſaid, that the deviſe being to him without impeachment of waſte, was a proof that a *Life Eſtate* was intended, for if a greater was in view, that proviſion could be of no uſe; and that it was certain that the Teſtator meant to give an Eſtate that was *forfeitable*; for if it was given to Truſtees after the determination of *Thomas Bagſhaw's* Eſtate for *Life*; that this Eſtate could determine only by the death of ſaid *Thomas*, or

by forfeiture: The firſt could not be meant, becauſe the remainder to truſtees is given only during the life of ſaid *Thomas*; the laſt therefore muſt be meant, viz. Determination of the Eſtate by forfeiture: His intention then was to give an eſtate that could be forfeited, which could not be a *fee*; for that is not forfeitable; of conſequence a *Life Eſtate* muſt be intended. Theſe circumſtances were conſidered as furniſhing a complete demonſtration of the Teſtator's intent to give an Eſtate for Life, and it was thus determined, and that the word *Heirs* was in this caſe a word of *purchaſe*.

It is true that *Ld. Hardwick*, after having given theſe reaſons, conſiders this caſe as being different from a *legal* eſtate, it being a *truſt* eſtate, cogniſable in *equity*, where the teſtator's intention was more to be regarded. But we ſhall find upon examination that this idea cannot be ſupported, the current of Authorities having always been that the Rules of Property muſt be the ſame in both Courts; and in the latter Authorities it is utterly exploded. Whoever reads *Ld. Hardwick's* argument in this caſe will be convinced, that he was diſſatisfied with the opinion of the Court of King's Bench, in the caſe of *Coulſon vs. Coulſon*. He therefore laid hold of a ſuppoſed diſtinction betwixt legal and truſt eſtates to avoid overturning that deciſion. But in the caſe of *Watts vs. Ball*, *P. Williams* 108,—we find it declared by *Ld. Cowper*, that *truſt* eſtates were to be governed by the ſame rules, and were within the ſame reaſons as *legal* eſtates. See the ſame doctrine admitted in *Philips vs. Philips*, *P. Williams* 35. In the caſe of *Bale vs. Coleman*, the opinion of *Ld. Nottingham* in the *Duke of Norfolk's* caſe is cited, where he laid it down as a maxim, that Truſts ſhould be governed by the ſame rules as legal eſtates. The opinion of Juſtice *Willes* in the caſe of *Perin* and *Blake* is to the ſame purpoſe. In the caſe of *Long* and *Laming*, *Burrow* 1100, *Ld. Mansfield* ſays, "A Court of Equity is as much bound by poſitive rules concerning Property, as a Court of Law is; what is ſufficient upon a Deviſe to make an exception out of the rule (referring to the rule in *Shelley's* caſe) holds as well in the caſe of a Legal Eſtate as in a Truſt. If the intention be contrary to the rules of law, it can no more take place in a Court of Equity than in a Court of Law: If the intention be illegal it is equally void in both."——The ſame

doctrine is fully recogniſed by *Ld. Thurlow* in the caſe of *Jones* and *Morgan*, reported in *Brown's Chancery Caſes*.

To eſtabliſh the ſame point, viz. that where the teſtator gives an eſtate to one and limits it over to the Heirs of his Body, and plainly intends that the heirs ſhall take by purchaſe, this intention ſhall be fulfilled; the caſe of *Long* and *Laming* is relied on.—This was a Deviſe of gavel kind Lands to A. C. and to the Heirs of her Body, as well females as males; which intention muſt have been, that the heirs take as purchaſers, and conſequently that A. C. ſhould take only an eſtate *for life*, as it was impoſſible that females ſhould take in a courſe of deſcent lands that were gavel kind, which deſcend to none but males; and this intention was fulfilled by the diviſion of the Court.

In the caſe of *Long* and *Laming* is cited the caſe of *Waker vs. Snow*, reported in *Palmer* 349, which was upon a deed, where E. conveyed lands to the uſe of himſelf for life, remainder to his firſt ſon and the heirs male of his body begotten, &c. and ſo to his ſix ſons, remainder to the right heir male of the ſaid E. to be begotten after the ſixth ſon, and his heirs male. This was holden not to be an eſtate tail in E. notwithſtanding the limitation to E's right heir after the ſixth ſon; it being apparent that he meant an *after born* ſon, as much as if he had ſaid ſo. And remarkable are the words of *Juſtice Wilmot* when obſerving upon the caſe; he ſays that "the word *heirs* is not to be conſtrued as a word of limitation either upon a Will or Deed, when the manifeſt intention of the teſtator, or of the parties, is declared to be, or clearly appears to be, that they ſhall not be ſo conſtrued." There is a caſe ſtated by *Anderſon* in *Shelley's* caſe, of a limitation to the uſe of A. for life, remainder to the uſe of his heirs and their heirs female, where it was determined that *heirs* was a word of purchaſe, and conſequently that A. took but an eſtate for life; the intention of the teſtator would have been defeated, if A. had taken an eſtate tail, for in ſuch caſe by the force of the term *heirs* he would have taken an eſtate tail general deſcendable to any heir; whereas it was certainly the deſign of the teſtator to create an eſtate tail female in the heir of A. by purchaſe.

From the foregoing Authorities, it is conſidered as de-

monſtrated that a ſtrict legal conſtruction or a technical ſenſe of any words ſhould not prevail againſt the ſuperior force of intention apparent on the Inſtrument. Whenever, then, the matter becomes certain that the term *heirs* is uſed with an *intent* that they ſhould take as *purchaſers*, it is contended that the Inſtrument ſhould be ſo conſtrued, as where an eſtate is given for life with a limitation to *heirs*, or *heirs of the body* of the Deviſee, altho' no inference can be made from the words themſelves that the Deviſor uſed them otherwiſe than in their legal ſenſe; yet if it is collectable from other expreſſions that he ſo intended they ſhall take as purchaſers, and the Deviſee an eſtate for life only.—See *Juſtice Buller's* argument in the caſe of *Hodgerſon* vs. *Ambroſe*, reported in *Douglaſs*—"For ſuch an intention, ſays he, is conſiſtant "with the rules of law, and ſuch eſtate might be given with-"out the infringement of any rule."—Of this opinion was *Ld. Hardwick* in *Bagſhaw* and *Spencer*; *Ld. Mansfield* in *Perin* and *Blake*; *Juſtices Aſton* and *Willes*, ſame caſe; Sir *Joſh. Jekyll* in *Puppillon* vs. *Voyce*, reported in *P. Williams*; *Chief Juſtice de Gray* and *Baron Smythe* in the caſe of *Perin* vs. *Blake* in the Exchequer Chamber, together with many other diſtinguiſh'd characters.

On the other hand it is allowed that the Intention is to govern if clear and conſiſtant with the rules of law; but it is contended that it is neceſſary to determine upon the whole Will whether by the word *heirs* the teſtator meant that ſucceſſion of perſons ſo denominated by law; and if he did, that the rule in *Shelley's* caſe muſt take place at all events, even if the teſtator had directed that the *heirs* ſhould take as *purchaſers*, and that the immediate deviſee ſhould take only an eſtate for life. But where the word is uſed in any other ſenſe, and inſtead of being intended to be uſed as *nomen collectivum* is uſed as *deſignatio perſonæ*, then the rule in *Shelley's* caſe is not to be applied, and the limitation is to take effect as if proper words had been uſed; that is, if the teſtator meant the eſtate ſhould go to whoever ſhould be *heir*,—then let his intention be what it might as to the heir's taking as *purchaſer*, the caſe is to be governed by the rule in *Shelley's* caſe; but if he meant ſome *particular perſon* ſhould take, inaptly denominated *heir*, the intention of the teſtator is to be fulfilled. If the deſign was to give the eſtate to thoſe per-

ſons known in law as a claſs called *heirs*, be they who they might, they muſt take by *deſcent*, and not by *purchaſe*—it being a rule that where the heir takes in *character* of heir, he muſt take in *quality* of heir. But where it is apparent that the teſtator's intention was to give it to ſome particular perſon by the denomination of heir, as his firſt or his ſeventh ſon, to the excluſion of others that might be his heirs; the intent being the ſame as if he had ſaid, "to my firſt ſon and his heirs;" in ſuch caſe the ſon would take by purchaſe, and the eſtate become deſcendable to the heirs of ſuch ſon, and not to the heirs of the teſtator. For Authorities to ſupport this opinion, ſee the caſe of *King* and *Melling*, *Ventris* 225. This was a deviſe to B. for life, and after his deceaſe to his iſſue on a ſecond wife, and for want of ſuch iſſue to J. M. with power to B. to make a jointure of the premiſes to ſuch ſecond wife. This was determined in B. R. to be an eſtate for life, againſt the opinion of *Hale*; upon the intent of the teſtator to give ſuch eſtate only, appearing from the circumſtances of impowering B. to make a jointure, which was not neceſſary if it was intended he ſhould take an eſtate greater than for life. But this judgment was reverſed, the intention notwithſtanding; for the word iſſue in a Will was held to be *nomen collectivum* and equivalent to heirs of his body, and no intention of uſing the word as *deſignatio perſonæ* any where appearing, the rule of law took place. This caſe I apprehend cannot be reconciled with the before cited caſe, which was ruled to be an eſtate for life by reaſon of *non aliter*. In that caſe the intention of the teſtator to give an eſtate for life only governed, whereas in this the intention was diſregarded, becauſe the word *iſſue* was uſed as *nomen collectivum*, when the term *ſons* was in that caſe as much uſed as *nomen collectivum* as iſſue in this.

The ſame doctrine is ſupported by the caſe of *Colſon* vs. *Colſon*, 2d. *Atkins* 247. It was a deviſe to C. for life, remainder to A. and B. and their heirs to preſerve contingent remainders; remainder to the heirs of the body of C. In this caſe it was determined that an eſtate tail in remainder was veſted in C. he taking a life eſtate not merged by the deviſe to the heirs of his body by reaſon of the remainder interpoſing between the deviſe to C. for life and the ſubſequent limitation to the heirs of his body. Nothing can be more certain than that the intention of the teſtator was to

give only a life eſtate to C. apparent from his placing truſtees to take advantage of any forfeiture of the eſtate which could be only in caſe he was tenant for life; which intention was made to yield to the rule of law, that the anceſtor cannot make his heir purchaſer *eo nomine*. That his heirs, *as heirs*, ſhould take per *formam doni* was ſufficiently manifeſt, there being nothing to point out that he uſed the words as *deſignatio perſonæ*; and altho he intended that they ſhould in character of heirs take as purchaſers, it was determined that this intention could not be fulfilled being prohibited by law.

I apprehend that it is impoſſible to reconcile this determination with that of *Bagſhaw* and *Spencer*, unleſs upon the exploded ground that a different rule of property obtains where it is a truſt eſtate, from what obtains where it is a legal eſtate. It is true there was in that caſe the clauſe *without impeachment of waſte*. But this could make no difference, for it was only another evidence of the teſtator's intention: But that could be of little weight, where that intention was ſufficiently clear. In a dubious caſe of intention it might ſerve to remove the doubt, but could add nothing to the meaſure of evidence where it was compleatly ſufficient without it; as in the caſe of *Colſon* vs. *Colſon*. To the ſame purpoſe is the caſe of *Duncombe* vs. *Duncombe* reported in the 3d of *Levinz*. See the caſe of *King* vs. *Burchell* cited in *Burrow* 1103, where lands were deviſed to J. K. for life and to the heir male of J. K. and his heirs, and for want of ſuch iſſue, over. This was determined, notwithſtanding the ſuperadded words of limitation, to be an eſtate tail in J. K. for it was ſaid that the ſuperadded words were nothing but a ſuperfluous declaration of what was implied in the terms *heir male*, which includes all that the ſuperadded words include.—This caſe I apprehend cannot be reconciled with the caſe of *Backhouſe* vs. *Wells*. In that caſe the term *iſſue* is uſed inſtead of *heirs*. But if the term *iſſue* in a Will is of the ſame import as the term *heirs*, which ſeems an acknowledged point by the Engliſh lawyers, and is mentioned by *Powel on Deviſes* 356,—as an indiſputable point; then the caſes are directly oppoſed, unleſs ſome magical powers are attached to the term *heirs* which make it mean ſomething diametrically oppoſite from another word of the ſame ſignification. *Juſtice Yates*, in his argument in the caſe of *Perin* and *Blake*, obſerves that "in *Backhouſe* and *Wells* and *Lud-*

" *dington* and *Kime*, the term *iſſue* is uſed, not *heir*; ſo not " to the point to ſhow in that caſe that the intention of the " teſtator was to prevail, for that thoſe caſes were not with- " in the rule laid down in *Shelley's* caſe." A man of leſs diſcernment than *Juſtice Yates* would have never diſcovered but what it was within the rule. If a term of the ſame ſignification as *heir* was made uſe of in an inſtrument, he would have conceived that the ſame conſtruction would have been given to it; it would have ſtruck him either as abſurd, or as a too exalted ſpecies of reaſoning for him to comprehend, that whenever *iſſue* and *heir* were uſed in a Will they meant one and the ſame thing and were both words of limitation; but if *iſſue* was uſed then the deviſee might take one kind of eſtate, and if *heir*, it muſt be of a very different kind. But was not the determination in *King* vs. *Burchell* oppoſed to the rule that a deviſee may be deſcribed by the word *heir*, if the teſtator plainly ſhews that the term *heir* was meant by him as *deſcriptio perſonæ*, ſee the rule *Powel on Deviſes*.— *Juſtice Yates* admits that the evidence of intention was of the ſtrongeſt kind in this caſe; and moſt certainly it was; for why ſhould he have expreſſed himſelf in the ſingular number? But more eſpecially the ſuperadded words of limitation demonſtrate that he intended the terms *heir male* as *deſignatio perſonæ*, for to *his* heirs he gives the eſtate and not to the heirs of J. K.; and to ſay that they are ſuperfluous only furniſhes an argument in favour of the intention, that *heir male* was intended as *deſcriptio perſonæ*; for otherwiſe there can be no reaſon given for his uſing them; they convey no idea whatever. But if we conſider them as deſigned to afford us evidence that the *heir male* ſhould take as *deſcriptio perſonæ* they become important, and we ſee very good reaſons for uſing them.

If a term which may have two very different ſignifications is uſed in an inſtrument, and with it are connected other terms clearly indicative of the ſenſe in which the author intended it; it ſeems ſtrange logic to ſay, that the explanatory words ſhall be rejected, and the dubious term left for *conſtruction*, without the aid of the explanation afforded by the author. It is alſo oppoſed to the caſe of *Clerk* and *Day*, *Croke Eliz.* 313, which was a deviſe " to R. for life, and if " ſhe have heir of her body, to that heir and the heirs of " their bodies, and a remainder over." This was deter-

mined to be an eſtate for life in R. and that the heir took as a purchaſer.——The caſe of *Minſhall* vs. *Minſhall*, 1ſt *Atkins* 412, was a deviſe "to R. and the *firſt heir male* of his "body, and *the heirs males* of his body, and a remainder "over." This was held to be an *eſtate tail*. Is this determination reconcilable with *Archer's* caſe? It differs from that caſe, in that it is a deviſe to the *heirs male* of the *firſt deviſee* in the *plural number*. That of *Archer's* was in the *ſingular number*. But this did not vary the caſe in *King* and *Burchell*; and we find in *Powel on Deviſes* 361, that *heir male* is *nomen collectivum*, and conveys the ſame idea as *heirs male*. And ſo was the caſe of *Trallop* vs. *Trallop*, where the deviſe was to one *for life*, and after his death to the *firſt heir male of his body*. This was held to be an *eſtate tail, in the firſt deviſee*. It alſo differs in this, that the eſtate given in *Archer's* caſe was to A. *for life and his next heir male*—In *Minſhall's* caſe, it was to the *firſt heir male*. Certain it is, that if *heir male* and *heirs male* mean the ſame thing, both being *nomina collectiva*, containing all the heirs of the deviſee in a courſe of deſcent, the only difference is what conſiſts in the different ſignification of the terms *firſt*, and *next*. I conceive it impoſſible for any perſon to underſtand any difference betwixt the *next heir male, and the firſt heir male*. Of courſe the one deciſion is contradictory to the other; and that *firſt* and *next* in ſuch caſe are of the ſame import—See *Powel on Deviſes* 363, where he ſays that, "*firſt*, *next* and *eldeſt* preceding the word *heir*, "only expreſs, what the word *heir* implies, viz. *firſt*, *next*, "or *eldeſt* taken for the future time, the one to ſucceed the "other according to the courſe of the common law." It ſeems then the term *heir ex vi termini* imports as much as *firſt* or *next*, &c. and the ſuperadded words of limitation; and they are therefore to be rejected as meaning nothing, as redundant, ſuperfluous words. So ſays the Chancellor in the caſe of *Minſhall* vs. *Minſhall*. If rejected for that reaſon in that caſe, they muſt be rejected for the ſame reaſon in *Archer's* caſe. And if the term *next heir* conveys no other idea than what *heir* conveys, and is implied in it, then the deviſe in *Archer's* caſe rejecting the ſuperfluous words, ſtands thus,—viz. "To A. for life and his heir male;" and we find that *heir male* means the ſame thing as *heirs male*. The deviſe is then the ſame as if it had been *to A. for life and his heirs male*; and that this would give an eſtate tail is admitted on all hands, and not *ſcintilla juris*, is to be found

to the contrary—See *Perin* vs. *Blake*. How then is the deciſion in *Archer's* caſe to be juſtified? There is yet another difference in the caſe of *Minſhall* vs. *Minſhall* from *Archer's* caſe. In the latter there is an expreſs deviſe *for life*, in the former, none. But this makes no difference, for the technical meaning of ſuch deviſe is the ſame as if the words for life had not been inſerted; and none pretend but what the rule of law is to prevail, unleſs you can collect the intention from ſome expreſſions, beſides thoſe of the technical kind. The Chancellor when diſtinguiſhing *Minſhall* vs. *Minſhall* from *Archer's* caſe, ſays, that in the laſt there was an expreſs deviſe for life; but of what avail can that be, when from that expreſſion without other aid nothing is collectable of the teſtator's intention? and all the other words, as, *next*, and the ſuperadded words of limitation are to be rejected according to the reaſoning in *Minſhall's* caſe. It therefore ſtands unaided with any other evidence of the intention, but that which is admitted by all as affording no evidence of any intention. He alſo ſays that in *Archer's* caſe the deviſe was to the next *heir* male, not *heirs* male. But of what importance can this be when they mean preciſely the ſame thing? In the caſe of *King* and *Burchell*, the deviſe was to J. for life, and to the *heir* male and *his heirs*. Here was a deviſe expreſsly for life and to the *heir male* in the ſingular number with words of ſuperadded limitation to *his heirs* in the plural number. Every thing here is found preciſely under thoſe circumſtances which the Chancellor ſuppoſed were the reaſons why *Archer's* caſe was conſidered an eſtate *for life*; and yet this was held to be an *eſtate tail*. In *King* and *Burchell* there was no limitation to the next heir male, but that, it ſeems, conveys no idea whatever. Strip *King* and *Burchell* of redundant expreſſions and it is a deviſe *to J. for life and his heir male*. The ſame deviſe is found in *Archer's* caſe, when ſtripped of redundant expreſſions; the one is an *eſtate tail* and the other an eſtate *for life*: And yet both theſe caſes are acknowledged to be good law. We may ſtill go further; the deviſe for life makes no difference. It is therefore in both caſes a deviſe to one and his *heir male*, which is exactly the ſame deviſe, as in the caſe of *Minſhall* vs. *Minſhall*, when ſtripped of ſuperfluous expreſſions. The caſe of *Goodright* vs. *Pullen*, 2nd. *Ld. Raymond* 1437, is another caſe where there was ſuperadded words of limitation; and in the ſame deviſe he uſed the term *heirs male* and *heir male*, as meaning

the ſame thing, and yet it was held an *eſtate tail.* May it not be queſtioned whether theſe caſes comport with the rule admitted by thoſe who are the ſtrongeſt advocates for the rule laid down in *Shelley's* caſe; that is to ſay, "if the terms *heir* or *iſſue* are ſo uſed by the teſtator as plainly ſhew that he uſed them as *deſignatio perſonæ*, they ſhall be thus taken?" Can any man doubt but that they were ſo uſed in *King* and *Burchel*, where the teſtator deviſes to the *heir male* of J. and *his heirs*; and in *Trollup* vs. *Trollup*, where the deviſe is to the "firſt *heir male.*" *Goodright* vs. *Pullen*, and *Minſhall* vs. *Minſhall* are in the ſame predicament. I apprehend that no one will be at any more loſs in determining that the terms *heir* and *heirs* there uſed were as plainly indicative of an intention to uſe them as terms of *purchaſe* as in *Archer's* caſe. The caſe of *Perin* and *Blake* is a notable caſe to ſhew in what uncertainty the law was reſpecting the operation of ſuch deviſes at the time it was determined. It was a deviſe of lands by the teſtator to his ſon, and in his Will he ſays, "it is my "intent and meaning that none of my children ſhall ſell and "diſpoſe of my eſtate for a longer time than *his life*, and to "that intent I deviſe the reſidue of my eſtate (having made "other deviſes to other children) to my ſon W. during his "natural life, the remainder to J. and his heirs, during the "life of W. remainder to the heirs of the body of W."— Here it was manifeſt that the teſtator intended only an *eſtate for life* to W. for he ſays that his intention is, that none of his children ſhall diſpoſe of his eſtate for a longer time than his life, and for that purpoſe deviſes to W. for life with remainder to J. for W's life; which could mean nothing unleſs to ſecure the contingent remainders to the heirs of W's body againſt the forfeiture of W's eſtate. He muſt have had in view a *forfeitable eſtate*, which muſt be an *eſtate for life.* And the teſtator's intention is equally plain, that altho' he intended that the heirs ſhould take as purchaſers, yet he did not mean to point out any particular perſon, but all poſſible heirs in a courſe of deſcent. The queſtion was what eſtate W. took? It was determined in *B. R.* by *Mansfield*, *Aſton* and *Willes* againſt *Yates* that he took an *eſtate for life* only; from the manifeſt intent of the teſtator that he ſhould thus take, and that this was a lawful intention. Whilſt *Yates* contended it was immaterial what the intention was as to the *anceſtor's* eſtate, and the only material enquiry was, what the

heirs were to take; and to make them take as *purchaſers* they muſt be deſignated particularly, which was not done in this caſe. Upon a writ of error this judgmeut was reverſed in the *Exchequer Chamber*, by the opinion of *Nares*, *Blackſtone*, *Gould*, *Perret*, *Addams*, and *Chief Baron Parker*, againſt the opinion of *Smythe* and Chief Juſtice *De Gray*.—There were then ſeven Judges againſt five; but one of thoſe Judges, *Blackſtone*, declared that, had the teſtator's intention been ſufficiently apparent to give an eſtate for life only, that he ſhould have voted for affirming the judgment: So that as to the great queſtion in the caſe, there were ſix Judges againſt ſix.—See *Hodyſon* vs. *Ambroſe* reported in *Douglaſs*. The caſes cited by the majority of the Court of *B. R.* among many others were *Law* and *Davis*, *Waker* and *Snow*, *Liſle* and *Gray*. *Archer's* caſe, *Clerk* and *Day*, *Luddington* and *Kime*, *Backhouſe* and *Wells*, *Bagſhaw* vs. *Spencer*. The anſwer to theſe caſes were, that in *Law* and *Davis* the firſt deviſe was a mere ſurpluſage, in that *Waker* and *Snow*, and *Liſle* and *Gray* there was an eſtate to the anceſtor for life, remainder to the firſt, ſecond and other ſons, and ſo on to the heirs of his body. "*So on*," was conſtrued to mean, in the ſame manner, (viz.) *ſons*; and therefore in theſe caſes the term *heirs* was uſed as *deſignatio perſonæ*. The inference I apprehend to be a juſt one; but there is not by any means ſtronger evidence of ſuch intention than where the teſtator uſes the term *heir male* with ſuperadded words of limitation, as in *King* and *Burchel*. As to *Archer's* caſe, and *Clerk* and *Day*, they ſaid that the word *heir* was in the ſingular number, and a limitation grafted on it. This is true; but ſo was *King* and *Burchel*. But what difference does it or can it make, when each word is *nomen collectivum*, and their technical ſignification the ſame. If either is to be underſtood as a word of *purchaſe*, it muſt be from ſome other expreſſions, and not from itſelf; and both are capable of being thus conſtrued. As to *Luddington* and *Kime*, *Backhouſe* and *Wells*, the term was "*iſſue*," they ſaid; but if *iſſue* in a Will, and *heirs of the body* mean the ſame thing, it is a weak anſwer. As to *Bagſhaw* and *Spencer*, this, it is ſaid, was a *truſt eſtate*, and the intention might be executed in Chancery. But the diſtinction betwixt a *truſt* and a *legal* eſtate cannot be maintained, and without the aid of that diſtinction, the caſes cannot be reconciled.

As to the deciſion of *Long* vs. *Laming*, it was ſaid to be out of the queſtion, as it was a deviſe of lands holden in gavel kind. How that ſhould make a difference I do not comprehend: Yet I conceive that in that caſe the determination might well proceed upon the ground of the teſtator's intention to uſe the term *heirs* as a word of purchaſe; for he ſays "female as well as male;" but this could not be without breaking in upon the courſe of deſcent. He did not therefore by the uſe of the term *heirs* mean that ſucceſſion of perſons ſo denominated by the law, who take in a courſe of deſcent. He muſt therefore intend to point them out particularly.

The caſe *Legate* vs. *Sewel* was a deviſe to his nephew L. for *life*, and after his deceaſe, to the *heirs* male of the body of his ſaid nephew to be begotten, and the *heirs males* of the body of every ſuch *heir* male ſeverally and ſucceſſively, as they ſhall be in priority of birth, &c.—This caſe was adjudged an eſtate tail in the firſt deviſee, by three Judges againſt one. How is this caſe reconcilable to *Archer's* caſe, and *Clerk* and *Day*? It differs only from *Clerk* and *Day* in this; that the term *heirs* is *plural*. See the caſe of *Pawſey* vs. *Lowdall* in 1ſt of *Rolle's* abr. where it is expreſsly determined, that *heir* and *heirs* have the ſame effect. And the reaſon why the heir male in *Archer's* caſe took by purchaſe, was becauſe the eſtate was limitted over "to the heirs male of the body of ſuch heir male." And this was the opinion of the court in the caſe of *Pawſey* vs. *Lowdall*, which is directly oppoſed to the determination in *Legate* vs. *Sewal*.

The caſe of *Bale* vs. *Coleman*, 1ſt *P. Williams* 142, was a deviſe to A. and his heirs for payment of debts, and then to A. for life with power to make leaſes for 99 years, remainder to the *heirs male* of A. This was determined by Lord *Cowper* to be an eſtate for *life*; and upon a rehearing before Lord *Harcourt*, it was determined to be an *eſtate tail*.

In the caſe of *Papillon* and *Voyce*, A. deviſed 10,000*l.* to truſtees, in truſt to be laid out in land, to be ſettled on B. for *life* without waſte, remainder to truſtees and their heirs for the *life* of B. to ſupport contingent remainders with

power to B. to make a jointure, remainder to the *heirs* of the body of B. and remainder over: And by the ſame will *lands* were deviſed to B. to the ſame uſes and in the ſame manner. This caſe was heard at the rolls by Sir *Joſeph Jekyll*; and upon the clear intent of the teſtator he determined, that B. had an *eſtate for life* only in the *lands*, and that the *money* ſhould be laid out in land to be ſettled on B. for *life*; and that his ſons ſhould take in *tale male* ſucceſſively. The intention to give an eſtate for *life* was very manifeſt in this caſe, independent of his *direction* that he ſhould take an eſtate for *life only*; for it was without impeachment of waſte; there was a power to make a *jointure*; and there was a deviſe to truſtees to ſupport *contingent remainders*. It was alſo clear as in any caſe that the teſtator uſed the term *heirs* as *nomen collectivum*, including all the poſſible heirs of the body, and their heirs. Certain it is, then, that in the opinion of the Maſter of the Rolls, this notwithſtanding, if there was a manifeſt *intention* to give an eſtate for *life*, ſuch eſtate only ſhould paſs. But this caſe was again heard by Chancellor *King* on an appeal; and ſo far as the judgment related to the *land* deviſed it was reverſed, and adjudged that B. took an *eſtate tail*: But, that as to the *money* to be laid out in land, this was *executory*, and the *intention* ſhould prevail. Why ſhould the law make the ſame terms, uſed in different clauſes in the ſame inſtrument, convey totally different ideas; when at the ſame time there is clear demonſtration, that he who uſed thoſe terms affixed the ſame ideas to them in the one clauſe, as in the other. If in fact the law had affixed ſuch preciſe and determinate ideas to thoſe terms as to forbid the *intention* to be followed, by what authority does the Chancellor decree a ſettlement according to what he ſuppoſes to be the *intention* of the teſtator even in part? The Chancellor muſt have ſuppoſed that the terms *heirs of his body*, carried with them ſufficient evidence that the teſtator meant the ſame thing, as firſt and every other ſon; for otherwiſe, he could not have ſo decreed; ſince his avowed deſign, as to the money to be laid out in land, was to fulfil the intention of the teſtator. He muſt have ſuppoſed then, that thoſe terms were a ſufficient *deſcription* of thoſe perſons, viz. *firſt and every other ſon*. But the moſt ſtrenuous advocates for the technical power of the terms *heirs* and *heir*

agree, that when theſe terms are uſed as a *deſcription* of certain *perſons*, fairly collectable from the context, as in *Liſle* and *Gray*, *Waker* and *Snow*, they ſhall be taken as words of *purchaſe*. It ſeems that Chancellor *King* ſuppoſed that the firſt and every other ſon were the perſons pointed out, or he would not have ſettled the eſtate upon them. But if he did, how came the decree as to the lands to be reverſed? For if the words *heirs of the body* are good as *deſcriptio perſonæ*, then the decree at the rolls was perfectly right according to the rule not diſputed. But if the terms *heirs of the body* are not good as *deſcriptio perſonæ*, how did the Chancellor find out who was deſcribed, ſo as to ſettle the purchaſed lands upon them? Do not the principles of this determination, as to the money to be laid out, overturn the deciſion as to the other part of the caſe, and eſtabliſh a precedent that the terms, *heirs of the body*, are equivalent to the *firſt and every other ſon*, which would be a ſufficient deſcription of the perſons ſo deſcribed to take as purchaſers? So Lord *Mansfield* underſtood theſe terms, when he ſays in the caſe of *Perin* and *Blake*, that "the intention of the teſtator was to paſs an eſtate for *life* to *Williams*, and an inheritance to be taken ſucceſſively by the heirs of his body.

Since the determination of *Coulſon* vs. *Coulſon*, there has been determined, upon the ſame principles, the caſe of *Sayre* and *Maſterman*; and *Hodgeſon* vs. *Ambroſe*, reported in *Douglaſs*, where the certificate from King's Bench to Chancery was in the words of *Coulſon* and *Coulſon*; from which caſe we ſhall find Lord *Mansfield* diſſatisfied with the caſe of *Coulſon* vs. *Coulſon*; he declares however he will abide by the determination of that caſe, tho *he* ſhould not ſo have judged. Judge *Buller* ſeems hardly reconciled to it; he however conſiders himſelf bound thus to decide upon every caſe which ſhall be preciſely the ſame with *Coulſon* and *Coulſon*; and he there conſiders the caſe of *Perin* and *Blake* as of no binding authority.——

The doctrine of *Hodgeſon* and *Ambroſe* amounts to this, "that where a teſtator uſes *technical* expreſſions only, their technical meaning muſt be adopted; but where it can be ſufficiently collected from the context that he means them in any other ſenſe, his *intention* ſhall prevail

againſt their technical import." And Juſtice *Buller* ſeems to ſuppoſe that the deciſion in the caſe of *Coulſon* and *Coulſon* may be made to comport with that rule.

In the caſe of *Jones* and *Morgan*, reported in *Brown's* chancery caſes, the doctrine of *Coulſon* and *Coulſon* is recognized; and the diſtinction between a *legal* and *truſt* eſtate being governed by different rules of property is conſidered as without foundation. Many more caſes might be examined; but the principal caſes, except *Robinſon* and *Robinſon* reported in *Burrow*, and *Dodſon* vs. *Crew* in the 2nd *Wilſon*, have been adverted to. As to thoſe caſes they were determined upon their own particular circumſtances.

From ſuch jarring deciſions it is extremely difficult to determine what the law is. To the preciſe extent of *Coulſon* and *Coulſon* it is ſettled; for that caſe is recognized as good law, but not as a caſe furniſhing this principle, viz. "that whenever the teſtator intends to uſe the term heirs as *nomen collectivum*, and at the ſame time intends that thoſe heirs ſhall take by purchaſe, that this intention cannot be thus complied with," as is contended by Mr. Juſtice *Yates*. I underſtand the court in *Hodgeſon* and *Ambroſe* to conſider it as a caſe in which *technical terms* only are uſed, and from which no inference could be fairly drawn that the teſtator intended a *life eſtate* merely to the firſt taker, and that the *heir* ſhould take as *purchaſer*.

If the caſe of *Jones* and *Morgan*, is to be conſidered as ſettling the law upon the ſubject, this doctrine is eſtabliſhed, that whenever the teſtator deviſes to any perſon "in *character of Heir*, he ſhall take in *quality of Heir*," whatever the *intention* might be. But that this was not the opinion of the Court of King's Bench when they determined *Hodgſon* vs. *Ambroſe*, is ſufficiently inferable from their language in that caſe; for its being the ſame caſe as *Coulſon* vs. *Coulſon* is the ground of the determination; and the ſymptoms of diſguſt with the deciſion in *Perin* & *Blake* are very apparent in the Court. It ſeems that in the opinion of that Court technical meanings are to give way to the intention of the teſtator, whenever that intention is collectable from any quarter, other than from technical

terms. As to ſuch terms the preſumption is, that the teſtator when he uſed them affixed to them the ideas affixed by law. The doctrine in *Jones* and *Morgan* is, that it is immaterial what the intention of the teſtator is reſpecting the firſt deviſee's taking an eſtate for life only, and the heirs taking as purchaſers. This never can be done unleſs it is apparent that the teſtator uſed the term as *deſignatio perſonæ*, and not as *nomen collectivum*. The Conrts of Law and Equity ſeem, by the lateſt authorities, to unite in rejecting any diſtinction between the term *heirs* in a *truſt* and *legal* eſtate. *Long* and *Laming*, *Hodgſon* and *Ambroſe*, *Jones* and *Morgan*.

Notwithſtanding the difficulties that attend the conſtruction of deviſes, where an eſtate is given to one for *life*, and to his *heir* or *heirs male*, &c.; yet in the caſe of marriage articles, where there is a covenant to ſettle an eſtate upon one for life, and the heirs of his body, &c. upon application to have this covenant carried into execution, chancery decrees an eſtate for *life* only to the firſt taker, and an eſtate *tail* to the eldeſt ſon, with remainder in tail to the ſecond, third, aud ſo on. And this is done in all caſes where thoſe terms are uſed, upon the declared deſign of carrying into execution the intention of the parties without endeavouring to collect the intention from any thing but from the technical terms themſelves. 1ſt *P. Williams*, *Bale* and *Coleman*, 142,—*Honor* and *Honor*, 123,—*Trevor* and *Trevor*, 612,—and *Weſt* and *Erriſey*, 2d. *P. Williams*, 349.

Is it not extraordinary that the ſame terms uſed in a deed or will ſhould have an operation totally different from what they have in a covenant? In the former caſes intention is as much to be regarded as in the latter. The conſtruction of ſuch words, it is ſaid, muſt be preſumed to be according to the technical ideas affixed to them: For every perſon muſt be ſuppoſed to know the meaning of the expreſſion that he uſes. To fulfil therefore his intention the words ſhall be taken to mean the ſame thing which the law has declared that they do mean. How then is it effected that the preſumption reſpecting the ſame words when uſed in a covenant ſhould not be the ſame? Why ſhould we

ſuppoſe in the latter caſe that the parties did not uſe thoſe technical terms in their technical ſenſe, when we are to ſuppoſe in a deed or will, that they were uſed in ſuch ſenſe? If the rule in *Shelley's* caſe is to operate in caſe of a deed or will, no reaſon can be aſſigned that it is not to operate in ſuch covenant. Surely the terms themſelves muſt afford ſufficient evidence to the Court that a life eſtate was intended to the firſt taker and an eſtate tail by purchaſe to the firſt ſon, &c. or otherwiſe ſuch ſettlement would never have been made, when purſuing up the intention of the parties. But if it could afford ſuch evidence to the Court in articles of a marriage covenant, why not in the caſe of a Will? And if it did, there could be no queſtion made in any of the caſes mentioned in this treatiſe; and the rule in *Shelley's* caſe could no longer have any operation. When we find ſuch diſcordant opinions reſpecting the operation of the rule in *Shelley's* caſe among the moſt eminent characters in the Engliſh nation; ſuch jarring deciſions, not reconcilable to each other, and ſuch a motley ſyſtem, that the ſame words in one inſtrument convey ideas entirely variant from thoſe conveyed by them in another; and that the whole controverſy originated from a rule eſtabliſhed upon feudal principles, which have long ceaſed in that country, and never had any exiſtance in this, I apprehend no ſolid reaſon can be given why we ſhould introduce that rule into our legal ſyſtem. The obvious meaning of the teſtator will be found to be the real meaning. The obſervations that have hitherto been made, relate only to the conſtruction of the term *heirs*, where an eſtate of freehold was given to the anceſtor, and by the ſame inſtrument an eſtate of inheritance to his heirs.

Let us now examine the operation of the terms *heir*, *iſſue*, &c. where a *real* or *perſonal chattel* is given to one and the *heirs of his body*, or to one and *his iſſue*.——As perſonal eſtate is not deſcendable to heirs, but veſts in no executor or adminiſtrator; it is a vain attempt to endeavour to *entail* it; for this would be to vary the law, and ſo cauſe a chattel to go to the heir which is not by law permitted. Beſides, as there is no way to deſtroy ſuch an eſtate by fine or recovery, as in caſe of a real eſtate, to ſuffer it to be done would be to create a perpetuity. There-

fore, wherever an intereſt in perſonal property is given by words which would create an entailment of real eſtate, ſuch perſonal property veſts abſolutely in the firſt taker, and is at his own diſpoſal. But as it is now a prineiple admitted in the Engliſh law, that perſonal eſtate may be limited to one for life with remainder over to another; whenever it is found that the teſtator uſed the term *heirs* or *iſſue*, not as *nomina collectiva*, but as pointing out certain particular perſons, collected from the tenor of the Will,—in ſuch caſes the firſt taker has only an eſtate for life, and the perſon meant by the term *heir* or *iſſue* has after the expiration of the life eſtate, an abſolute eſtate therein entirely at his diſpoſal. But would it not better comport with the general intention of the teſtator, to ſuffer the heir to take it abſolutely, and always to underſtand that term in ſuch eſtates, as a word of *purchaſe*? For although the whole intention of the teſtator cannot be fulfilled, ſo that a perpetuity ſhould take place; yet it better ſatisfies his intention, that the firſt taker ſhould have only a *life eſtate* and the heir the whole,—than it would to diveſt the heir of all intereſt in it, and ſo give to the firſt deviſee the whole property.

We have already ſeen that with reſpect to articles of marriage agreements, where an eſtate was covenanted to be ſettled upon A. and the *heirs of his body*, that that term has been held in ſuch inſtrument as a word of purchaſe. And when ſuch covenant is carried into execution, the eſtate is limitted to A. for *life*, and to the firſt ſon in tail and remainder over to the ſecond ſon, &c. But in caſe of a chattel, it is not a life eſtate in the firſt ſon and remainder over, but veſts abſolutely in ſuch perſon as is intended to be marked out by the teſtator by the term *heir*, &c.—Altho' the rule is, that expreſs words which create an eſtate tail in real property, when applied to perſonal veſts the firſt taker with the abſolute ownerſhip; yet ſuch words as create an eſtate tail by implication in real property when applied to perſonal give the firſt taker an eſtate for life only, and the perſon to whom it is limitted over or entailed ſhall have the abſolute eſtate after the expiration of the life: So that if real and perſonal eſtate be conveyed to one by ſuch words, the deviſee will take an eſtate tail of in-

heritance in the real eſtate, and an eſtate for life only in the perſonal; as was the caſe of *Forth* and *Chapman*, reported in 1ſt *Pere Williams*, 665, where the deviſe was of freehold and leaſe-hold eſtate to A. for *life*, and if A. died leaving no iſſue, then to B. it was determined that A. took an eſtate tail in the free-hold lands, and an eſtate for life in the leaſe-hold; for in the laſt he was ſuppoſed to mean by the words *leaving no iſſue*, leaving none *at his death*, but in the former he was ſuppoſed to mean that if A. died without iſſue generally, by which there might at any time be a failure of iſſue.

The accumen of aſtute Judges, is able to force theſe different ideas with reſpect to the ſame words into the minds of the teſtators, but to them alone are we indebted for theſe diſtinctions, they would, with deference to the opinion of grave and learned Judges, have eſcaped the man that poſſeſſed nothing more than plain good ſenſe and a ſound underſtanding. When the intention of the teſtator was apparent to entail perſonal property, and when not, we ſhall find the ſame diſcordance of opinion among the Engliſh lawyers, in caſes of perſonal eſtate as in caſes of real.

Whether in any inſtance in the ſtate of Connecticut a deviſe of perſonal eſtate to one and his heirs can upon principle be conſidered as veſting the whole in the firſt deviſee, may be conſidered as a queſtion. The law of this State with reſpect to a limitation of a perſonal eſtate to one for life, and remainder over to another, is conſidered I apprehend the ſame with the Engliſh law. And the great reaſon why a limitation to one and his heirs in the Engliſh law is not permitted, is the danger of eſtabliſhing thereby a perpetuity. To prevent this, the law declares that in ſuch caſe the whole intereſt veſts in the firſt deviſee. But by our law of entailments an entailed eſtate veſts a fee-ſimple in the iſſue of the firſt donee; ſo that all danger of a perpetuity is at an end; and of conſequence there is no danger of indulging the intention of the teſtator by admitting ſuch a limitation to be effectual, to veſt in the heirs the eſtate given. Among the numerous authorities upon this ſubject are *Atkinſon* vs. *Hutcheſon*, 3d of *P. Williams*, 259,—*Soltern* vs. *Soltern*, 2d. of *Atkins*, 376,—*Pelham* vs. *Gregory*,

5th of *Brown's* parliamentary caſes,—*Theebridge* vs. *Kilburn*, 2d. of *Veſey* 236,—*Garth* vs. *Baldwin*, 2d. of *Veſey*, 646, &c. *Hodgeſon* vs. *Buſſey*, 2d. *Atkins*. 89,—*Seale* vs. *Seale*, 1ſt of *P. Williams*, 290,—*Beauclerk* vs. *Dormer* 2d. *Atkins*, 312.

Of the Maxim NEMO EST HÆRES VIVENTIS.

WHEN an eſtate is given to a man and his *heirs*,—this veſts nothing in the heir; it altogether veſts in the deviſee or grantee, the term heirs only ſerve to ſhew the nature of the eſtate: That is to ſay, an eſtate, that in a courſe of deſcent will go to his *heirs*. If, therefore, A. deviſes an eſtate to B. and his *heirs*, and B. dies in the life time of the teſtator, the deviſe is lapſed, for *nemo eſt hæres viventis*. So if given to the *heirs* of C. and C. is living when the deviſe is to operate,—that is to ſay, upon A's death there is no perſon according to the afore-mentioned *maxim* to take the eſtate.—*Plowden*, *Brett* vs. *Rigden*. But if the deſcription is ſuch as to make it clear, that the teſtator meant ſome particular perſon to take, this intention ſhall be regarded, as a deviſe by A. "to the *heir* of C. now living," whilſt C. was alive. *Burchell* vs. *Durdant*, *Tom Raymond*, 330. In this caſe it was plain that he meant the heir apparent of C. And wherever the caſe comes up to this, that the teſtator intended by the term *heir*, an *heir apparent*, the deviſe is good and veſts in ſuch heir apparent by purchaſe. In the caſe of a deviſe to A. and his *heirs*, A. dies living the teſtator,—what difficulty would there be in conſidering the *heirs* of A. as taking by purchaſe upon the contingency of their anceſtor's dying before the teſtator? And in the caſe of a deviſe to the *heirs* of C,—C. being then alive,—is not the preſumption violent that he meant the *heir apparent* of C.? It muſt be ſo, unleſs we can ſuppoſe the teſtator whimſical enough when he gave the eſtate to intend that it ſhould not go to any by deviſe, unleſs the anceſtor of that perſon was dead.

How

How far the Term HEIRS *is neceſſary to convey an Eſtate of Inheritance either in a Deed or Will.*

WE have already ſeen what the operation of that term is in ſuch an inſtrument. I ſhall now conſider in what caſes a fee may be conveyed without the uſe of that term. It is a maxim eſtabliſhed in the Engliſh law, that in a deed ſuch term is abſolutely neceſſary to the tranſmiſſion of a fee. —If the conveyance is to a man and *his heirs forever*, a fee ſimple is given and thoſe words of inheritance and perpetuity are eſſential in ſuch grant. If the conveyance is to a man and the *heirs of his body*, an *eſtate tail* is created; and without ſuch words of inheritance and procreation no ſuch eſtate can be created by deed. But in Wills the abſolute neceſſity of their uſe has been diſpenſed with, in very many inſtances. The governing rule is, that the *intention* of the teſtator is to prevail; and ſuch conſtruction is to be given to the words of a Will as to effectuate ſuch eſtate as comports with the intention of the teſtator, provided ſuch intention is conſiſtant with the rules of law; that is to ſay, provided the eſtate intended to be conveyed is ſuch an one, as the law will ſuffer to be given by any words whatever. In all the caſes, then, upon this ſubject where the proper technical terms have not been uſed, the queſtion is,—What is the intention of the teſtator? And if that is diſcovered to be a legal intention, it is to be complied with. Upon this ground it is held that a deviſe in "*fee-ſimple*," or in *fee-tail*," conveys ſuch eſtate as thoſe words import. To one and *his iſſue*, or one and *his ſeed*, conveys an *eſtate tail*. A deviſe of lands and houſes, &c. to one *forever* without words of inheritance, conveys a fee ſimple. A gift by one of houſes, lands, &c. *to pay his debts*, is a *fee*, for it implies a power to ſell. A deviſe of lands, &c. upon paying a ſum in groſs gives a fee; otherwiſe where ſuch deviſe is to pay out of the annual profits. A deviſe of all my *eſtate* carries with it a *fee*, as it denotes not only the *ſubject*, but the *intereſt* in that ſubject. But it is ſaid in ſome authorities, that if the deviſe of the eſtate is connected with words of *locality*, as, "my eſtate at H," then in ſuch caſe an eſtate for *life* only paſſes,—3d of *Wilſon* 418,—*Cowper* 306,—*Douglaſs* 730. We find the ſame

doctrine laid down by Lord *Mansfield* as settled law, that "all my estate" passes every thing; but if attended with a *local* description, nothing more than an estate for *life* passes. But why is this distinction made? If "all my estate" denotes the *subject* and *quantum* of interest, how is it altered by saying, for instance, "all my estate at H.?" One would imagine that the testator intended the expression to be merely restrictve to his estate in *that place* But why should not the *subject* and the *interest* in the subject pass? And if my interest therein was a *fee*, what prevents a *fee* from passing? If the terms "all my estate" denote the *extent of property* that I have in the whole estate, that I own in the world; why should not "all my estate at H." denote the *extent* of *property* that I have at H.? Notwithstanding the great authority derived to this doctrine from the declarations of Lord *Mansfield* and Chief Justice *De Grey*: Yet I apprehend that the current of authorities is, that altho' the term "estate" is connected with words descriptive of its *locality*, yet a fee passes—2d. *Vesey* 614—A devise of "my estate at A." was held to pass the *interest* in the lands, which interest being a *fee simple*, a fee simple passed. In the 2d of *Levinz*, 91, there were words of *locality*, yet a *fee* passed—2d of *Atkins* 38, where there was a devise of "all my interest in *Kirby Hall*." Lord *Hardwick* held a *fee* passed, the locality notwithstanding. The case of *Ibetson* vs. *Beckwith* there cited is to the same purpose; it being expresly laid down, that an estate *at* or *in* such a *place* may carry a fee.—2d. of *P. Williams* 524, "all my estate in Upper Colesby," passed a *fee simple*. *Durnford* 412, the word *estate* passed a fee: And it is laid down by Justice *Buller*, that it will pass a *fee* in a Will, unless attended with restrictive words which clearly manifest the intention of the testator that a fee should not pass. The same doctrine is maintained 2d of *Durnford* 657, &c. and that the term "estates" in the plural was equivalent to the term "estate," in the singular. The above authorities are not reconcilable with the doctrine before laid down respecting the operation of the word *estate* connected with words of *locality*. "All my effects real and personal," pass a fee; *Cowper* 299. The terms "*all I am worth*," pass a *fee*; 1st *Brown's* chancery 437. Where a man

Sir 6 Mod. 106.

deviſes "all his houſes, lands, farms," &c. to one; ſuch devile is holden to convey only an eſtate for life; for theſe of themſelves never convey more than a deſcription of the thing *per ſe*; 3d *Wilſon* 414.—*Douglaſs* 730. The ſame doctrine is recogniſed by Lord *Hardwick*, who ſays, that a deviſe of "my eſtate in occupation of ſuch a perſon,' paſſes only a *life eſtate*. It muſt be allowed that the circumſtance of pointing out that it was in the poſſeſſion of a particular perſon, ſerves to ſhew the words to be deſcriptive of a farm only. But where do we find any apparent intention in the teſtator that the *fee* of this farm, ſhould not paſs to the deviſee? We find it ſaid in *Durnford*, that when this term is uſed a fee muſt paſs unleſs there is an apparent intention of the teſtator to the contrary. Why ſhould not a deviſe of "all my farm," without more words, paſs a *fee ſimple?* It muſt be admitted, that moſt men do not when they deviſe *real* property think that any thing can be neceſſary more in that caſe, than when they deviſe *perſonal* property. When a teſtator gives to J. S. an horſe, he has not the moſt diſtant idea that it is for the *life* of J. S. neither is it ſo, but forever. Neither in the caſe ſuppoſed does he imagine he is giving his *farm* for *life*, but ſuppoſes that the ſame words which imply a gift *forever* of *perſonal* eſtate, alſo imply a gift *forever* of *real* eſtate. Ought it not to be preſumed that the teſtator intended a *fee ſimple* in all ſuch caſes, except where we find from other parts of the Will that he underſtood how to deviſe *technically*. We may preſume, ſince he is acquainted with, and chuſes to make uſe of, the barbarous dialect of *Aſhdod*, that he intended only an eſtate for *life*. In the caſe of *Right* and *Sidebotham*, *Douglaſs* 730, Lord *Mansfield* ſays, that "all my eſtate" would paſs a *fee ſimple;* but "all my lands lying in ſuch a place" had been conſidered only as deſcriptive of their *locality*, and an eſtate for *life* was given. But why do the terms "all my eſtate" paſs a *fee ſimple?* Becauſe, it is ſaid, that theſe words convey to us the idea, not only of the *ſubject* given, but of the *intereſt* that the deviſor had in the ſubject: If he had a *fee ſimple*, it follows a *fee ſimple* was *intended* to be paſſed, and the *intention* is go govern when conſiſtent with the rules of law. But it is obſervable that Lord *Mansfield* ſays, that, he had no doubt of the

intention of the deviſor to paſs a *fee ſimple* in that caſe. Why then was it not ſo adjudged? It muſt be that, the words uſed in that Will were not ſuch words as had been conſidered as ſufficiently evidential of the deviſor's intention. It ſeems then that altho' the Court is clear beyond a poſſibility of doubt what the deviſor's intention was, yet this intention is not to govern them unleſs the evidence of ſuch intention is derived to them through a certain ſet of words. When it was firſt eſtabliſhed that the words "*all my eſtate*" paſs a fee ſimple, theſe were not the legal technical words to paſs a fee; how then came it to be ſo adjudged? The anſwer is obvious upon the clear *intention* of the teſtator that it ſhould be ſo. Why then ſhould it not always be thus adjudged, when the intention is equally clear? Can any ſolid advantage be derived to us by adopting ſuch diſtinctions, unleſs we are ſatisfied that they are founded in ſound ſenſe? That the law reſpecting *deviſes* ſhould approach much nearer to the ſtandard of common ſenſe than that of *Deeds*, is not extraordinary; for the latter was grown into a ſyſtem by the adjudications of man, groping in the thick darkneſs of a Gothick night, and was riveted in the minds of men by the ſyllogiſtic jargon of *Schoolmen*. But the law of deviſes did not commence a formation, until the kindly beams of liberal ſcience had began to irradiate the world, when a ſyſtem more conformable to the dictates of reaſon might be expected.

It can hardly be doubted, that if the ſyſtems of Deeds and Wills had ſprang up together, but what the ſame words would have had the ſame effect in a Deed as in a Will. Surely it is as important in the former, as in the latter, that the *intention* ſhould be complied with, and there can be no danger of admitting this idea. The words in a Will to convey a fee ſimple, muſt be clear, ſuch as are indicative of that *intention* beyond a doubt. The indulgence ſhewn to *Wills* admits of no *conjecture*; for the rule is, that the words uſed muſt clearly demonſtrate what kind of eſtate was intended to be given. Will not the ſame words in a Deed convey the ſame ideas with equal clearneſs? Does not common ſenſe revolt at the idea that Courts, whoſe peculiar province it is to adminiſter *Juſtice*, ſhould give a

conſtruction to ſuch words, when found in a *Deed*, as is diametrically oppoſed to the intention of the parties, and the clear unequivocal meaning of the words themſelves. Will the inveſtigating mind reſt ſatisfied with the reaſons given, that in Wills the *intention* is to be regarded when clearly expreſſed, altho' not disfigured by a certain ſet of technical expreſſions; that a teſtator is often *inops conſillii*; his wiſhes are therefore to be complied with, and no criminality imputed to him for not expreſſing himſelf in the language of a Lawyer. But as to the man who conveys by Deed, he probably is in ſound health; let him expreſs his intention with ever ſo much perſpicuity, ſince he has an opportunity to procure a Confeſſor in Technics, if he will not, they will impoſe the penalty upon him of thwarting his intention, and adjudge that he meant that, which they know he never intended. The warmeſt advocate for the galling fetters of *ſyſtems* and *precedents* will find it difficult to convince the mind, not illuminated by legal maxims, of the propriety of giving different conſtructions to the ſame words in different Inſtruments, when it is beyond a doubt that the perſons uſing them affixed the ſame ideas to the words in the one Inſtrument, as they did in the other.

Of the Operation of the Term HEIRS *in a Bond.*

BY the Engliſh law the *perſonal eſtate* is the only fund for the payment of debts of deceaſed perſons, unleſs the *heir* is bound by the Deed of his anceſtor, and in ſuch caſe the Specialty Creditors may reſort to the heir, or rather to the real eſtate of the anceſtor deſcended to the heir; and for the payment of ſuch debts the heir is bound to the extent of the real eſtate deſcended from the anceſtor, but is not bound to pay his *ſimple contract debts*; theſe are to be ſought for no where but from the executor, who has nothing to do with the real eſtate, nor any controul over it. However great the real eſtate may be which has deſcended to the heir, if there is a deficiency of perſonal aſſets ſuch creditors muſt loſe their debts. Our law, founded upon more equitable principles, ſubjects the real upon the deficiency of perſonal eſtate to the payment of all the debts of deceaſed perſons, without any diſtinction be-

twixt Specialty Creditors and others. The whole eſtate both real and perſonal is, by our law, in the hands of the executor, and ſubject to the payment of all debts. No additional ſecurity is therefore gained to the creditor by binding the *heir* in a bond; the law has already ſecured to him his right of recovering his debts againſt the executor to the extent of the whole eſtate of the deceaſed. He has not any occaſion to reſort to the heir, for before the heir can have any part of the real eſtate, the executor carves out to himſelf as much of it, as is neceſſary to pay the debts. It is therefore very problematical whether, in this State, any action can be ſuſtained againſt the heir for the debt of the anceſtor. But admitting that it can in ſome exempt inſtances, it is not becauſe the anceſtor bound the heir; but his liability, if any, ariſes from the equitable conſideration, that he has received eſtate from the anceſtor, and the intervention of ſome cauſe that has prevented a recovery from the executor, and that without any negligence in the creditor. The term Heir, therefore, altho' a word of the utmoſt importance and ſignification in an Engliſh bond, is an idle and inſignificant expreſſion with us. Would it not be beſt to omit it in ſuch inſtruments where it can ſerve no other purpoſe than to introduce a confuſion of ideas, which I apprehend is commonly the caſe when through imitation we retain a word that conveys important ideas to an Engliſh Lawyer, and with us has no operation.

THE END.

Ex. J. M.